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No. 94-995

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WORCESTER COUNTY, MARYLAND, *et al.*,
Petitioners,

v.

HONISS W. CANE, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Worcester County, Maryland, *et al.*, submit the following reply to Respondents' Brief in Opposition ("Opp."). As demonstrated below, Respondents' arguments are without merit, and this Court should grant the Petition for a Writ of Certiorari ("Pet.").

I. THIS CASE IS RIPE FOR REVIEW

Respondents first argue that this case is not ripe for review because the judgment is not final. Opp. at 6-8. Yet Respondents' own authority states that "[t]he Supreme Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals and other

federal courts whose judgments are reviewable pursuant to § 1254(1). Invocation of such jurisdiction . . . is not conditioned on the finality of the judgment or order in question." Robert L. Stern *et al.*, Supreme Court Practice 195 (7th ed. 1993). Indeed,

> [i]n a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment. Some opinions suggest that certiorari should be available only to review a ruling that is "fundamental to the further conduct of the case," as if somehow exceptional circumstances are required, and at times certiorari has been denied with an express statement that the case was not yet ripe for review. Yet certiorari has been granted to review many nonfinal dispositions without any further explanation, even over dissenting objection that the case was not yet ready for review. The truth of the matter is that any court of appeals ruling that reverses a final judgment and requires further proceedings is fundamental to the further conduct of the case. Review is granted or denied according to a wide range of concerns, some of which bear on the finality of the disposition below, and many of which do not.

17 Charles A. Wright *et al.*, Federal Practice and Procedure: Jurisdiction and Related Matters § 4036, at 29-32 (2d ed. 1988) (footnotes omitted).

Here, the Court should grant certiorari because this case presents an issue of extraordinary public importance: whether liability under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, may rest on the possibility that a non-compact majority-minority district can be drawn when that district conflicts with this Court's decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). This issue is one that impacts literally thousands of cities, counties, and other local governmental entities. It does not involve a matter of merely private interest, and its resolution does not

depend on further development of a trial record.[1] In short, this case is one in which "a United States court of appeals has decided an important question of federal law . . . in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). Consequently, Respondents' argument that this Court should deny certiorari simply because the Fourth Circuit has remanded the matter to the district court fails.

II. PETITIONERS SEEK REVIEW OF THE LOWER COURTS' LEGAL CONCLUSION REGARDING "GEOGRAPHICAL COMPACTNESS," AND DO NOT SEEK REVIEW OF FACTUAL FINDINGS

Contrary to Respondents' assertion (Opp. at 9) that Petitioners are seeking review of factual findings on the "geographical compactness" precondition of *Thornburg v. Gingles*, 478 U.S. 30 (1986), Petitioners in actuality seek review of the lower courts' legal conclusion that a racially gerrymandered majority-minority district satisfied this precondition. There is no dispute in this record concerning the following facts:

(1) the physical appearance of Respondents' proposed district; or

(2) the Respondents' intentional and exclusive use of race as the basis for drawing those boundary lines.

Indeed, the lower courts' conclusion regarding geographical compactness was the legal foundation—and the pivotal error—upon which § 2 liability was based. If that geographical compactness holding is erroneous as a matter

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[1] Respondents try to distract this Court by arguing that the Petition misstated certain facts. Regardless of the number of plans Respondents submitted that were considered by the district court (two), or the exact percentage of black voting age population in Respondents' proposed majority-minority districts, this case merits review because the lower courts' liability holdings rest on non-compact, race-based districts that violate *Shaw*.

of law, as we contend it is under *Hays*,[2] *Miller*,[3] *Vera*[4] and *Shaw*[5], then the § 2 liability determination cannot stand.

Respondents seek to insulate that legally erroneous holding from judicial scrutiny by arguing that the remedial plan imposed by the district court on remand is different from the one used to satisfy the "geographical compactness" precondition. Respondents cannot deny, however, that any remedy the district court imposes rests ultimately on its holding of § 2 liability. Nor can they deny that the linchpin of that holding was the districting plans they offered to prove the geographical compactness precondition. As we have shown, the critical feature of those plans was a non-compact district created by means of a racially motivated manipulation of boundaries for the purpose of cordoning off black enclaves to assure minority electoral success. The crucial issue presented by this Petition—whether a § 2 liability determination can be based on such a racially gerrymandered, non-compact, majority black district—*is* very much a live issue before this Court. That issue strikes at the heart of the § 2 liability holding by the lower courts. To say that issue has somehow mysteriously "evaporated" (Opp. at 10) because a remedial plan was ordered misses the point.

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[2] *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded*, 114 S. Ct. 2731, *further proceedings on remand*, 862 F. Supp. 119 (W.D. La.), *stayed pending appeal*, 115 S. Ct. 31, *pob. juris. noted and cases consolidated*, Nos. 94-558, 94-627, 63 U.S.L.W. 3454 (U.S. Dec. 13, 1994).

[3] *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga.) (per curiam), *stay granted*, 115 S. Ct. 36 (1994), *prob. juris. noted*, Nos. 94-631, 94-797, 94-929, 1995 U.S. LEXIS 74 (U.S. Jan. 6, 1995).

[4] *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex.), *stay granted*, C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12334 (S.D. Tex. Sept. 2, 1994), *appeal pending*, Nos. 94-805, 94-806 (U.S.).

[5] *Shaw*, 113 S. Ct. 2816.

Furthermore, Respondents' effort to distinguish this case from *Shaw* and *Hays* falls short of the mark. Respondents argue that, unlike *Hays* and *Shaw*, which involve Fourteenth Amendment challenges to congressional redistricting, the present case involves a statutory challenge under Section 2 to a local government. But surely the applicability of the Fourteenth Amendment principle of *Shaw* and *Hays* is not restricted to congressional redistricting. The "one-person, one vote" requirement and the constitutional prohibition against intentional vote dilution—both of which stem from the Fourteenth Amendment—apply to local governments as well. *See City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Avery v. Midland County*, 390 U.S. 474 (1968). *Shaw* and *Hays*, which likewise rest on the Fourteenth Amendment, should do so as well.[6]

III. *VOINOVICH* DID NOT ADDRESS THE ISSUE BEFORE THIS COURT

Respondents claim that "[t]he County's argument that plaintiffs violated *Shaw* by taking race into account in complying with the first prong of *Gingles* is plainly frivolous." Opp. at 11. Respondents further contend that this Court rejected just such an argument in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993). Opp. at 12.

Petitioners, however, did not argue that *Shaw* is violated whenever race is taken into account. Instead, Petitioners argued that *Shaw* prohibits the creation of non-compact districts that take only race into account, unless they are narrowly tailored to serve a compelling govern-

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[6] Respondents' argument (Opp. at 11) that the courts below "had no occasion to consider" such "*Shaw*-type questions" as whether a compelling governmental interest might exist for a non-compact district in Worcester County or whether Respondents' proposed district was narrowly tailored to further that interest likewise fails. The only reason that the lower courts failed to consider these issues, however, is that they erroneously held that Respondents' district was not "bizarre" under *Shaw*. This failure, therefore, provides no reason at all to deny the petition.

mental interest. Pet. at 8-10. For this reason alone, *Voinovich* is simply not on point. Moreover, *Voinovich* expressly reserves the issue of whether the conscious use of race in redistricting violates the Equal Protection Clause. 113 S. Ct. at 1157. For this reason as well, it lends no support to Respondents' argument.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the Court of Appeals. Alternatively, in view of the fact that this Court has recently noted probable jurisdiction in *Hays* and *Miller*, disposition of the instant petition should be withheld pending the Court's decisions in those cases.

Respectfully submitted.

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